

In the December 18, 2003, Award, Judge Frobish denied claimant's request for workers compensation benefits after finding claimant failed to timely file an application for

hearing, as required by K.S.A. 44-534(b), within three years of the accident date or within two years of the last payment of compensation, whichever is later. The Judge concluded claimant's application for hearing, which was not filed until February 2003, was not timely whether the appropriate accident date was May 6, 1999, when claimant reported a second accident, or whether the accident date was July 3, 1999, which the Judge determined was claimant's last day of work for respondent.

Claimant contends Judge Frobish erred. Claimant argues K.S.A. 44-534(b) does not preclude her from pursuing this claim as respondent and its insurance carriers accepted this as a compensable claim, provided her with medical benefits and later offered her a cash settlement, which failed to mention either a time limit on the offer or a time limit on filing an application for hearing with the Division of Workers Compensation. In her brief to the Board, claimant argues, in part:

Thus the Respondent should not be allowed to send out open-ended offers to resolve claims to unrepresented claimants, not advising them of possible statute of limitations then sitting idly by while the offer to resolve the claim remains open, and then when the offer is not accepted commence to court before the Division of Workers' Compensation and claim they need the protection of a statute of limitations. Not only is the *[sic]* unequitable *[sic]*, but also is contrary to the current status of the case law in the State of Kansas.<sup>1</sup>

Unfortunately, claimant does not cite any authority or cases to support her argument.

Claimant also argues for the first time on this appeal that the period for filing an application for hearing was extended because respondent had claimant evaluated in June 2003 by Dr. Philip R. Mills and, therefore, the February 2003 application for hearing was timely. Accordingly, claimant requests the Board to reverse the December 18, 2003, Award and grant her permanent disability benefits for a 15 percent whole body functional impairment.

Conversely, respondent contends the December 18, 2003, Award should be affirmed.

The only issues before the Board on this appeal are:

1. Did claimant file a timely application for hearing as required by K.S.A. 44-534(b)?
2. If so, what is the nature and extent of claimant's injury and disability?

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<sup>1</sup> Claimant's Brief at 2 (filed Jan. 30, 2004).

**FINDINGS OF FACT**

After reviewing the entire record, the Board finds:

1. Claimant alleges that she injured herself each day that she worked for respondent as a machine operator from April 1, 1997, through her last day of employment in August 1999.
2. While working as a machine operator for respondent, claimant began experiencing back symptoms, which she reported to her supervisor. As a result, respondent sent claimant to see Drs. Paul Sandhu, Smith and Kevin Komes.
3. After Dr. Komes rated claimant's functional impairment and released her to return to regular duties in November 1997, claimant sought medical treatment on her own. Accordingly, claimant returned to Dr. Sandhu, who referred her to orthopedic surgeon Dr. Mohammed Shakil. And in either October or November 1998, Dr. Shakil performed a discectomy between claimant's fourth and fifth lumbar vertebrae. According to claimant, she did not submit the expenses of her back surgery to respondent for payment as part of this workers compensation claim.
4. After recovering from the back surgery, claimant returned to work for respondent. But in May 1999, claimant requested additional medical treatment from respondent after lifting a steel shaft, which caused her back symptoms to worsen. Respondent referred claimant to Dr. Sandhu, who sent claimant back to Dr. Shakil. As a result of the May 1999 incident, claimant received physical therapy as part of the medical regimen authorized by respondent.
5. In mid-July 1999, claimant quit her job with respondent because her back symptoms were worsening and she believed her work would continue to aggravate her back. According to respondent's records, July 3, 1999, was claimant's last day of working for respondent.
6. In April and May 1999, respondent's attorney wrote claimant regarding settlement of her claim. Claimant, however, did not respond to either letter but, instead, consulted an attorney about her claim. Moreover, on June 15, 1999, claimant presented respondent with a document entitled Claim for Workers Compensation in which she alleged a May 6, 1999, accident.
7. The records introduced at the regular hearing indicate claimant last received medical treatment in June 1999 at respondent's expense. Those same records also indicate respondent last paid medical expense on claimant's behalf in November 1999.

8. On February 7, 2003, claimant filed an application for hearing, form E-1, with the Division of Workers Compensation.

**CONCLUSIONS OF LAW**

The December 18, 2003, Award should be affirmed.

The Workers Compensation Act requires a worker to file an application for hearing with the Division of Workers Compensation within either three years of the accident or within two years of the last payment of compensation, whichever is later.<sup>2</sup>

Whether claimant sustained distinct and separate accidents in April 1997 and in May 1999 or whether she sustained a long series of micro-traumas through her last day of employment with respondent on July 3, 1999, claimant has failed to prove that she filed a timely application for hearing as required by the Act. In short, the February 7, 2003, application for hearing was filed more than three years after any of the purported dates of accident and also more than two years after respondent either provided or paid medical compensation.

For the first time on appeal to this Board, claimant argued that the February 2003 application for hearing was timely as respondent had claimant evaluated by Dr. Philip R. Mills in June 2003. The Board concludes claimant's argument is without merit.

The Workers Compensation Act does not provide that the time for filing an application is revived by a medical evaluation. Although not directly on point, see *Thompson*,<sup>3</sup> where the Kansas Supreme Court held a medical examination to evaluate disability does not constitute medical treatment and, therefore, did not lengthen the period for written claim. Likewise, see *Rutledge*,<sup>4</sup> where the Kansas Supreme Court held the time period for written claim was not revived when the employer provided medical treatment after that period had expired.

Consequently, claimant has failed to prove she filed a timely application for hearing. Accordingly, claimant's request for additional benefits was properly denied.

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<sup>2</sup> K.S.A. 44-534(b).

<sup>3</sup> *Thompson v. Swenson Construction Co.*, 158 Kan. 49, 55, 145 P.2d 166 (1944).

<sup>4</sup> *Rutledge v. Sandlin*, 181 Kan. 369, 310 P.2d 950 (1957).

**AWARD**

**WHEREFORE**, the Board affirms the December 18, 2003, Award.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April 2004.

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
Stephen J. Jones, Attorney for Respondent and its Insurance Carriers  
Jon L. Frobish, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director